

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY LEE THOMPSON,

Defendant-Appellant.

UNPUBLISHED

August 25, 2009

No. 284160

Genesee Circuit Court

LC No. 07-020463-FC

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment without parole. He appeals as of right. We affirm.

Defendant's conviction arises from the October 7, 1996, drowning death of William Beauchamp in Genesee County. Julie Vega, a bartender at the Viking Lounge bar, testified that defendant and codefendant Randy Snyder encountered Beauchamp, a homeless man, at the bar on the evening of October 6, 1996. According to Vega, defendant remarked that he wanted to harm Beauchamp for something he had done to defendant's grandmother. Beauchamp thereafter left the bar with defendant and Snyder, despite Vega's warning not to go with them.

Beauchamp's body was discovered in the Flint River near a fishing site the following morning. A forensic examination indicated that he had been struck in the head with a blunt object, dragged to the river, and immersed in the water while still alive. The examiner determined that the cause of Beauchamp's death was drowning. After seeing a news report of Beauchamp's death, Vega contacted the police and gave them defendant's name. She also identified defendant's photograph from a photographic array. Lieutenant Shanlian interviewed defendant, who admitted meeting Beauchamp at the bar, but claimed that he left the bar with his wife. Defendant's wife corroborated defendant's alibi.

The investigation stalled until Lieutenant Shanlian learned in 2006 that Snyder had made statements implicating himself and defendant in Beauchamp's death. After interviewing Snyder, Shanlian obtained a warrant for defendant's arrest and drove to Tennessee where defendant was then living. After defendant was arrested, he agreed to waive extradition and return to Michigan. Shanlian interviewed defendant after his arrest. Defendant admitted leaving the bar with Snyder and Beauchamp and going to the fishing site, but stated that he was too intoxicated to fully

understand what was happening. He claimed that he and Beauchamp got into a fight, during which Beauchamp jumped on him and immobilized him, and then Snyder hit Beauchamp with a tire iron to get him off defendant. According to defendant, he and Snyder then drove away, leaving Beauchamp behind. Defendant subsequently recalled that he and Beauchamp fought in the water, but did not admit to drowning him.

Before trial, defendant moved to suppress his confession on the ground that it was not voluntarily given. Defendant argued in part that his confession was induced by Shanlian's threats that his wife could be arrested for obstruction of justice and that his children could be placed in foster care. The trial court held a *Walker*¹ hearing at which Shanlian denied threatening to arrest defendant's wife or to remove defendant's children. Shanlian testified that defendant raised these issues when Shanlian asked him whether he had asked his wife to lie for him in the 1996 interview. Shanlian claimed that he repeatedly told defendant that he did not intend to arrest his wife, although he acknowledged telling defendant that the prosecutor had the authority to initiate criminal charges against her. The trial court ultimately determined that, under the totality of the circumstances, defendant's confession was not involuntary.

I. Voluntariness of Defendant's Confession

Defendant first argues that the trial court erred in denying his motion to suppress his confession. Defendant contends that his confession was not voluntarily given because it was induced by Shanlian's threats that, if defendant did not cooperate and tell the truth, his wife could be arrested and prosecuted for obstruction of justice and his children placed in foster care.

A defendant's statement obtained during a custodial interrogation is admissible only if the defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). When assessing a defendant's claim that a challenged statement was involuntary, an appellate court reviews the record de novo and makes an independent determination of voluntariness. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996). However, deference is given to the trial court's assessment of the evidence and the credibility of the witnesses. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). The trial court's findings of fact are reviewed for clear error. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of a confession indicates that it was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). A non-exhaustive list of factors to consider in determining voluntariness include:

[t]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured,

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

Threats and promises of leniency are also factors to consider. *People v Sexton*, 458 Mich 43, 66; 580 NW2d 404 (1998). In *People v Conte*, 421 Mich 704; 365 NW2d 648 (1984), a majority of our Supreme Court concluded that whether a promise of leniency may render a defendant's statement involuntary is also to be evaluated under the totality of the circumstances. *Id.* at 761-762. In this case, defendant and Shanlian presented conflicting testimony concerning the circumstances surrounding defendant's custodial interview. An evaluation of defendant's confession under the totality of the circumstances ultimately depends on which witness was more credible.

According to defendant, Shanlian made comments to the effect that he would contact the prosecutor about bringing charges against defendant's wife for obstruction of justice if defendant did not provide a statement. Defendant claimed that Shanlian also advised him that if defendant's wife were arrested, their children would be placed in foster care. Defendant also claimed that he was cold and uncomfortable in the interrogation room, and was not given an opportunity to take his pain medication.

Conversely, Shanlian testified that he affirmatively advised defendant that he did not intend to arrest defendant's wife, although he acknowledged advising defendant that the prosecutor could independently decide to charge her with obstruction of justice. A transcript of recorded portions of defendant's interview corroborates this account. Shanlian's acknowledgment that any decision to charge defendant's wife rested with the prosecutor, and not with him, negates an inference that Shanlian was attempting to induce a confession by offering leniency for defendant's wife as a quid-pro-quo for defendant's confession, or by threatening to bring criminal charges against defendant's wife as a consequence of defendant's refusal to cooperate and give a statement. Shanlian also testified that defendant was regularly offered food, water, and bathroom breaks. Moreover, according to Shanlian, it was defendant who first raised the issue of possible criminal charges against defendant's wife. Shanlian testified that he responded to defendant's question by positively stating that he had no intention of arresting defendant's wife, but acknowledging that he could not speak for the prosecutor, who had the authority to independently initiate charges for obstruction of justice. This account, if true, indicates that Shanlian did not seize upon defendant's concern for his wife's jeopardy as a means of extracting a confession from him.

It was the trial court's prerogative to assess the credibility of the witnesses. See *Shipley*, *supra* at 372-373. Considering the totality of the circumstances in accordance with Shanlian's version of events, which the trial court apparently found more credible, we conclude that defendant's confession was not involuntarily given. The trial court did not err in denying defendant's motion to suppress his confession.

II. Identification Testimony

Defendant argues that the trial court erred in denying his motion to suppress Vega's identification testimony. Defendant contends that Vega's identification of him resulted from an impermissibly suggestive photographic array.

A trial court's decision to admit identification evidence generally will not be reversed unless it is clearly erroneous, *People v Kurylczuk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993); *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). A photographic identification procedure violates a defendant's right to due process when it is so impermissibly suggestive under the totality of the circumstances that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *Kurylczuk*, *supra* at 302.

Defendant contends that the photographic array is impermissibly suggestive because his appearance is markedly distinctive from that of the other men in the filler photographs, because he is the only man who is fully bald, the only man with a prominent goatee, and he appears to be the oldest. Differences among participants in a lineup are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other participants in the lineup. *Id.* at 312. "Physical differences generally relate only to the weight of an identification and not to its admissibility." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). After reviewing the photographic array, we agree with the trial court that the physical differences between the participants do not substantially distinguish defendant from the other participants. Although defendant is partially bald, the other participants have high hairlines and short hair, and one participant appears to have a shaven, if not bald, head. Defendant's goatee is not particularly prominent, and two other subjects (one and six) also appear to have thin facial hair on their chins. Contrary to what defendant asserts, he does not appear noticeably older than the other participants. Although subject three appears to be younger, the remaining subjects, including defendant, appear to be relatively close in age. The trial court did not clearly err in finding that the photographic array is not impermissibly suggestive.

III. Juror Oath

Next, defendant argues that a new trial is required because the trial court failed to administer an oath to prospective jurors before the beginning of the jury selection process, contrary to MCR 6.412(B). Defendant did not object to the trial court's failure to administer the oath. Thus, this issue is not preserved.

We disagree with defendant's argument that the failure to administer the oath required by MCR 6.412(B) is structural error requiring automatic reversal without a showing of prejudice. *People v Anderson (After Remand)*, 446 Mich 392, 404-405; 521 NW2d 538 (1994). "A structural error is a 'fundamental constitutional error[] that 'def[ies] analysis by 'harmless error' standards.'" *People v Miller*, 482 Mich 540, 556; 759 NW2d 850 (2008), quoting *Neder v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (emphasis in the original). The pre-selection oath prescribed by MCR 6.412(B) is not constitutionally required. Our jurisdictions have similarly found that errors relating to the administration of juror oaths are not structural errors. See *State v Godfrey*, 136 Ariz 471; 666 P2d 1080 (1983), *State v Saybolt*, 461 NW2d 729 (Minn App, 1990), *State v Block*, 170 Wis2d 676; 489 NW2d 715 (Wis App, 1992),

and *State v Vogh*, 179 Or App 585; 41 P3d 421 (2002). See, also, *Miller, supra* at 547, 556 (recognizing that although a criminal defendant has a constitutional right to be tried by an impartial jury, a criminal defendant does not have a constitutional right to be tried by a jury free of convicted felons and, therefore, the presence of a convicted felon on the defendant's jury, contrary to statute, did not constitute structural error). Accordingly, because failure to administer the pre-selection oath required by MCR 6.412(B) is not structural error, to avoid forfeiture of this unpreserved issue, defendant must demonstrate plain error affecting his substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Although there is no indication in the record that the trial court administered the pre-selection oath required by MCR 6.412(B), the record reflects that the court did administer an oath after the jury was selected that substantially comported with MCL 768.14. Further, defendant has not demonstrated that any of the jurors either were not impartial, or were untruthful or concealed information during voir dire. Therefore, defendant has not demonstrated that his substantial rights were affected.

Defendant also argues that trial counsel was ineffective for failing to object to the trial court's failure to administer the oath required by MCR 6.412(B). Even assuming that counsel's failure to object was objectively unreasonable, defendant has not demonstrated the requisite prejudice necessary to establish a claim of ineffective assistance of counsel. See *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

IV. Defendant's Standard 4 Brief

Defendant raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, neither of which have merit.

First, defendant argues that the prosecutor committed misconduct during closing argument when she stated that (1) Beauchamp was "very likely rendered unconscious," (2) Beauchamp "did not arrive at the Irish Road site conscious," (3) defendant dragged Beauchamp out of the truck, and (4) Beauchamp was beat in the truck before being taken to the Irish Road site. Defendant claims that these purported facts were not supported by the evidence. We disagree. Because defendant failed to preserve this issue for appeal with a timely and specific objection in the trial court, our review is for plain error affecting substantial rights. See *Carines, supra* at 752-753; *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). But a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). The prosecutor is, however, free to argue the evidence and any reasonable inferences that may arise from the evidence. *Id.*

Here, Dr. Qazi Azher, the forensic pathologist who performed the autopsy on Beauchamp, testified about his several injuries, including facial bruising and lacerations, bilateral eye hemorrhages, broken nasal bones, broken teeth, subcutaneous hemorrhage beneath the scalp, as well as bruising and abrasions on both sides of his body. In particular, with regard to the

abrasions on the right side of Beauchamp's chest and abdomen, Dr. Azher testified: "basically these are like drag marks." When specifically asked about these abrasion injuries, Dr. Azher repeatedly testified that they were consistent with Beauchamp being dragged. Dr. Azher also testified that the head injuries were consistent with blunt trauma to the head. He further opined that Beauchamp was alive when he entered the water, but indicated that Beauchamp could have been unconscious. In light of this trial testimony, as well as the reasonable inferences that arise from the evidence, this claim of prosecutorial misconduct lacks merit. See *Ackerman, supra*. Thus, defendant's claim of ineffective assistance of counsel premised on this argument is also without merit.

Finally, defendant argues that the trial court improperly vouched for a prosecution witness when it referred to the witness as "our friend." After review of this unpreserved claim for plain error affecting substantial rights, we disagree. See *Carines, supra*; *Barber, supra*.

A trial court has a duty to assure that all parties receive a fair trial. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). One morning, just before the trial was to continue, the trial court stated: "Members of the jury, good morning, all. I'll swear in our friend Lieutenant Shanlian here so [defense counsel] can continue the cross." Considered in context, we conclude that the trial court's statement was merely a colloquial use of the phrase "our friend" that would not lead reasonable jurors to believe that the trial court was vouching for the credibility of this witness. Accordingly, this argument is without merit. And defendant's claim of ineffective assistance of counsel premised on this argument is without merit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis